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IN THE

Supreme Court of the United States

October Term, 1966.

No. 528.

WILLIAM J. BAUERS, JR.,
Petitioner,

v.

HERBERT T. HEISEL, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ROBERT W. MARIS,
2635 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pennsylvania. 19109

ANTHONY G. AMSTERDAM,
3400 Chestnut Street,
Philadelphia, Pennsylvania. 19104

MELVIN WULF,
156 Fifth Avenue,
New York City, New York. 10010
Attorneys for Petitioner.

Of Counsel:

PETER HEARN,
2001 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pennsylvania. 19109

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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No.

WILLIAM J. BAUERS, JR.,

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v.

HERBERT T. HEISEL, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, William J. Bauers, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above matter.

OPINIONS BELOW.

The opinions of the Court of Appeals for the Third Circuit have not yet been reported. They are reprinted in the Appendix hereto, *infra*, pp. 1a-25a. The order of the District Court for the District of New Jersey is not reported. It is reprinted in the Appendix hereto, *infra*, p. 43a.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on May 19, 1966. A Petition for Rehearing was filed on June 2, 1966 and was denied on June 9, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF QUESTIONS PRESENTED.

In knowing or negligent violation of the statutory exclusive jurisdiction of the Juvenile Court, prosecutor Heisel secured petitioner Bauers' indictment as an adult criminal. Ighoring Bauers' repeated requests for trial, Heisel maliciously delayed Bauers' trial on this indictment for more than two years, thus denying him his constitutional rights to a speedy trial. A State appellate court, subsequently finding that Heisel had proceeded without jurisdiction because Bauers had been a juvenile, vacated and expunged from the official records the indictment, conviction and sentence procured in this manner. Bauers thereupon sued prosecutor Heisel under the Civil Rights Act, REV. STAT. § 1979 (1875), 42 U. S. C. § 1983 (1964), for damages for the deprivation of his rights under the Federal Constitution. The United States District Court dismissed the complaint and the Court of Appeals for the Third Circuit affirmed on the sole ground that Congress had intended that prosecutors, when acting generally like prosecutors, should be immune from suit under § 1983. Therefore the questions presented are:

(1) Did Congress intend to immunize a State prosecutor entirely from damages under 42 U. S. C. § 1983 when he knowingly or negligently institutes a prosecution without any statutory authority, in violation of due process of law?

(2) Did Congress intend to immunize a State prosecutor from damages under 42 U. S. C. § 1983 when he maliciously refuses a defendant's request for trial and thereby deprives the defendant of his constitutional rights to a speedy trial and other due process protections?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statutory provisions involved are contained in the Civil Rights Act, REV. STAT. § 1979 (1875), 42 U. S. C. § 1983 (1964); in New Jersey Statutes Annotated, 2A:4-14 and 2A:4-15; and in New Jersey Rules of Criminal Procedure, R. R. 6:9-1(b) and (c). The language in these statutes and rules relied on herein is as follows:

42 U. S. C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

New Jersey Stat. Ann., 2A:4-14 and 2A:4-15:

> "2A:4-14 *Exclusive jurisdiction; juvenile delinquency defined; . . .*
>
> Except as stated in section 2A:4-15 of this title, the juvenile and domestic relations court shall have exclusive jurisdiction to hear and determine all cases of juvenile delinquency.
>
> Juvenile delinquency is hereby defined as the commission by a child under 18 years of age
>
> (1) of any act which when committed by a person of the age of 18 years or over would constitute:
>
> a. A felony, high misdemeanor, misdemeanor, or other offense, or
>
> b. The violation of any penal law or municipal ordinance, or

c. Any act or offense for which he could be prosecuted in the method partaking of the nature of a criminal action or proceeding . . .

2A:4-15. *Cases referred to county prosecutor;* . . .

If it shall appear to the satisfaction of the juvenile and domestic relations court that a case of juvenile delinquency as defined in section 2A:4-14 of this title committed by any juvenile of the age of 16 or 17 years, should not be dealt with by the court, either because of the fact that the person is an habitual offender, or has been charged with an offense of a heinous nature, under circumstances which may require the imposition of a sentence, . . . then the court may refer such case to the county prosecutor of the county wherein the court is situate."

New Jersey Rules of Crim. Proc., R. R. 6:9-1(b) and (c):

"(b) Where the juvenile is charged with causing the death of a person the prosecutor shall be notified and shall appear at all hearings involving the charge, including any preliminary hearing held pursuant to N. J. S. 2A:4-15 and Rule 6:9-7. . . ."
"(c) In cases other than where there is a death involved, the judge [of the Juvenile Court] shall conduct the examination of the juvenile and other witnesses. . . ."

The present case also involves the provisions of the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE.

On October 29, 1950, when William J. Bauers, Jr., the petitioner here, was 17 years old he escaped from a Hunterdon County, New Jersey, juvenile reformatory. During the course of his escape, he took part in auto theft in Hunterdon County and Essex County, New Jersey. He was apprehended shortly thereafter in Essex County and indicted on November 27, 1950, by the Essex County grand jury for auto larceny and assault with intent to rob, committed in Essex County. He pleaded *non vult* to the charges and was sentenced by the Essex County Court to a term of four to six years in the State prison.

While he was serving the Essex County sentence, Bauers was indicted on January 3, 1951, by the Hunterdon County grand jury for reformatory escape and auto larceny. Despite protests written by Bauers from prison to the Hunterdon County prosecutor, more than two years elapsed before Bauers was finally brought to trial on the Hunterdon County charges in May of 1953. Respondent, Herbert T. Heisel, Jr., was at that time the County prosecutor of Hunterdon County, New Jersey.

Bauers appeared before the Hunterdon County Court at 10 A. M. on May 21, 1953. He requested that counsel be appointed to represent him and the judge granted the request. Immediately thereafter a jury was selected and the court recessed briefly. When it reconvened at 10:15 A. M. Bauers pleaded guilty on the instruction of his court-appointed counsel, withdrawing a previously entered plea of not guilty. The County judge accepted the plea and sentenced Bauers to two to three years on each count in State prison, the sentences to run concurrently with his Essex County sentences and with each other.[1]

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1. The Court of Appeals below noted: "The factual elements surrounding the appointment of counsel are not greatly dissimilar from the case of *Powell v. Alabama,* 287 U. S. 45 (1932) . . . ." (App. 2a *infra*).

Ten years later, in February, 1963 Bauers applied to the Hunterdon County Court for an order vacating the indictments, convictions, and sentences in the 1951-1953 prosecution. The basis of Bauers' application was the absence of jurisdiction in prosecutor Heisel and the Hunterdon County Court: since Bauers had been a juvenile at the time he committed his 1950 offenses, he was subject to the exclusive jurisdiction of the Hunterdon County Juvenile Court under N. J. Stat. Ann. 2A:4-14. See also N. J. Stat. Ann. 2A:4-15. The County Court denied relief, but the Appellate Division of the New Jersey Superior Court reversed, holding that exclusive authority to charge, prosecute and try Bauers for his 1950 offenses had been vested by statute in the Hunterdon County Juvenile Court. The Superior Court ruled that the Hunterdon County indictments, guilty pleas and sentences imposed under the judgment of conviction "should be expunged from the record."

Thereupon Bauers brought the present suit against Hunterdon County prosecutor Heisel under the Civil Rights Act, REV. STAT. § 1879 (1875), 42 U. S. C. § 1983 (1964), seeking damages. His *pro se* complaint and annexed exhibits recited the facts set forth above and further alleged:

(1) That Heisel, acting in his official capacity, caused the Hunterdon County grand jury to return two illegal criminal indictments against him;

(2) That Heisel knowingly or negligently prosecuted Bauers, though he knew or should have known that Bauers was 17 at the time of his escape and that therefore the Juvenile Court had exclusive jurisdiction;

(3) That Heisel maliciously breached his duties of office and thereby caused Bauers to be denied a speedy trial;

(4) That Heisel acted prejudicially at Bauers' trial by moving for a two to three-year sentence when he knew or should have known that a pre-sentence report was mandatory and was not before the Court.

The Complaint was filed on January 26, 1965, together with a request for leave to proceed *in forma pauperis* in the United States District Court for the District of New Jersey (App. 28a-42a *infra*). The district Judge ordered the clerk to file the complaint and on the same day dismissed it on the ground that it was "lacking in merit and pertains to matters over which the Court has no jurisdiction" (App. 43a *infra*). Bauers' notice of appeal was filed February 1, 1965.

On October 5, 1965, the appeal was submitted on briefs to a panel of three judges of the United States Court of Appeals for the Third Circuit. However, the appeal was resubmitted to the Court of Appeals *en banc* for the reason indicated by the subsequent majority opinion:

> "On this appeal, the sole issue raised is whether the defendant, acting as the Hunterdon County Prosecutor, is immune from suit under the Civil Rights Act, 42 U. S. C. § 1983, R. S. § 1979. Because a full consideration of the arguments presented requires a reexamination of the position taken by this court in Picking v. Pennsylvania R. R., 151 F. 2d 240 (C. A. 3, 1945), the case was submitted to the court en banc." (App. 3a-4a *infra*)

In an opinion handed down May 26, 1966, a majority of five judges overruled *Picking* and affirmed dismissal of the complaint on the ground that, even if a cause of action were stated, the Hunterdon County Prosecutor enjoyed a quasi-judicial immunity from civil liability for his acts. Two judges, concurring in the result, rejected the majority view of the extent of "judicial immunity" and rested their concurrence on the view that the complaint failed to state a cause of action (App. 18a *infra*). Judge Biggs, dissenting, concluded that the complaint stated a cause of action and that no immunity existed (App. 19a-22a *infra*). Finally, Judge Freedman, dissenting, held that Bauers should, at the least, be permitted to plead further under the Rules of

Civil Procedure and that the line of quasi-judicial immunity drawn by the majority was improper (App. 22a-25a

On June 9, 1966, the Court denied rehearing (App. 27a *infra*).[2]

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2. Because of the posture in which the case was considered by the majority of the Court of Appeals, no issue as to the sufficiency of the complaint to state an actionable claim for damages is presented by the decision of that Court. The majority assumed *arguendo* that the alleged illegal prosecution and denial of a speedy trial abridged Bauers' constitutional rights and gave him a cause of action under 42 U. S. C. § 1983 but for questions of immunity. The present case was used as a vehicle for expressly overruling *Picking v. Pennsylvania R. R.*, 151 F. 2d 240 (3d Cir. 1945), on the issue of judicial immunity, and for adumbrating in an extensive opinion the doctrine of quasi-judicial immunity for prosecutors. On this petition for certiorari, then, the adequacy of the *pro se* complaint—dismissed by the district court without awaiting an answer or motion to dismiss, and without leave to amend—must be taken as established. At the same time, it should be noted that the dissenting opinion of Judge Biggs seems correct in concluding that the present complaint, even without further amendment, should not have been dismissed on the merits, under "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46.

REASONS FOR GRANTING THE WRIT.

A. In Pierson v. Ray This Court Has Agreed to Review the Scope of Police and Judicial Immunity Under the Civil Rights Act and Review of the Present Case Involving a Prosecutor Together With Pierson Would Permit Full Resolution of the Confused and Important Area of Immunity From Civil Rights Act Liability.

The Civil Rights Act, 42 U. S. C. § 1983, and the scope of redress which it allows for official abuse have become increasingly important in contemporary American society. See *City of Greenwood v. Peacock*, 86 S. Ct. 1800, 1813-1814 (1966). Review of the cases brought under the Act shows that the defendants most commonly joined in these actions are police officers, prosecutors and judges.[3] Frequently, all three are sued together. In passing upon claims against these three classes of officers the courts, while disagreeing from court to court upon the proper rationale, have generally given the same scope of immunity from liability to judges and to prosecutors indiscriminately and, prior to this Court's decision in *Monroe v. Pape*, 365 U. S. 167, often to police officers as well.

There is no express guidance from this Court as to the applicability of the Civil Rights Act to judges and prosecutors. Indeed between this Court's decision in *Tenney v. Brandhove*, 341 U. S. 367, recognizing common law immunity for legislators, and *Monroe v. Pape, supra*, permitting suit against police officers, there is an unclear gray area in which many Courts of Appeals, including most recently the Court below, have attempted to draw various lines—without success.

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3. A representative sample of these cases is set forth in footnote 7 of the opinion of the Court of Appeals for the Third Circuit below (App. 7a-9a *infra*).

Pierson v. Ray, 352 F. 2d 213 (5th Cir. 1965), presented a civil rights damage action under 42 U. S. C. § 1983 against several policemen and a judge. The Court of Appeals held that immunity barred suit against the judge, but not against the policemen. On May 16, 1966, this Court granted cross petitions for certiorari, October Term 1966, Nos. 79 and 94. By granting review in *Pierson* the Court has evidenced a desire to clarify this important but confused area of the law. Its decision in that case can be more comprehensively considered and its conclusions concerning the applicability of immunity principles to Civil Rights Act complaints under § 1983 more effectively promulgated if the normal third party to the trio of officials, the prosecutor, is also brought before the Court. Because of the nature of the decision below, the present case offers an ideal opportunity to round out the issues presented in *Pierson*, so that they may be adequately deliberated upon and definitively resolved by the Court.

In its early decision in *Picking v. Pennsylvania R. R.*, 151 F. 2d 240 (3d Cir. 1945), the Third Circuit gave the Civil Rights Act a broad interpretation and found no immunity for judicial officers under it. The Third Circuit expressly undertook to hear the present case *en banc* because it believed that the case would have been controlled by *Picking*, except that *Picking* had been vitiated by this Court's decision in *Tenney v. Brandhove, supra*. Upon reconsideration five members of the Court overruled *Picking* and found complete immunity both for a judge and for a prosecutor acting within his "jurisdiction."[4] Two judges concurred in overruling *Picking* but disagreed that the defendant in the present case had immunity. A third judge, concurring in overruling *Picking*, held that the immunity of a prosecutor exists only when he undertakes an exercise of judgment which is "truly quasi-judicial in nature" (App. 23a *infra*). This judge felt that the facts of record were not sufficiently developed to permit applica-

4. The lack of clarity as to what the court meant by "jurisdiction" is discussed at pages 11-12 below.

tion of such a standard and would have remanded. Finally, one judge, dissenting, would have held that the Civil Rights Act covered the action of the defendant and that he was not immune from suit. Thus the case offers a broad spectrum of views of the judges of the Court of Appeals, whose extensive opinions present a major examination of the issue of the immunity of prosecutors under the Civil Rights Act. It is a highly appropriate companion case for *Pierson v. Ray* and this Court should grant certiorari to consider the two cases together.

Plenary consideration by the Court is the more imperatively required because of the "confused and confusing" state of the law in § 1983 cases. This was the characterization of the Court of Appeals for the Fifth Circuit in 1952, *McGuire v. Todd*, 198 F. 2d 60, 63, and the confusion has not abated since that time. The unsatisfactory tangle of immunity doctrines under the Federal Civil Rights Act is amply demonstrated by the various opinions below and in the earlier decisions of other circuits.

A bare majority of the Court below established the rule that the acts of a prosecutor are immune from question under the Civil Rights Act if they are performed within his jurisdiction, even though the acts might be in excess of the jurisdiction or an abuse of it. On the other hand the majority indicates that a prosecutor could be held liable for acts clearly outside his jurisdiction. Other judges, concurring or dissenting, would draw a different line. But that the line drawn by the majority is obscure and unworkable seems plain, for the majority itself patently fails to apply the "jurisdiction" concept which its opinion announces to the facts before it. The complaint in issue alleges that prosecutor Heisel improperly charged Bauers and had him indicted, when the statutes of New Jersey invested exclusive power over the case in the Juvenile Court and not in the prosecutor. This allegation charged an act which was *outside* the prosecutor's statutory jurisdiction. The complaint also alleged that the defendant maliciously denied

plaintiff a speedy trial. This charged a constitutional violation by abuse of power within the exercise of his jurisdiction. Yet the majority treats both these claims as if they were identical, and holds that immunity bars both. Thus, even in its own opinion as applied to the facts before it, the Court of Appeals uses the term "jurisdiction" to mean both (1) acting within *statutory* authority and (2) doing acts which prosecutors *customarily* engage in, *regardless* of statutory authority.

A like instance of a court struggling to apply inadequate immunity doctrines to a different fact situation is found in *Robichaud v. Ronan*, 351 F. 2d 533 (9th Cir. 1965). There the § 1983 complaint alleged that an Arizona prosecutor had charged a juvenile plaintiff maliciously and without cause; held her in a "drunk tank" for 25 days without hearing; interrogated her with tricks and deceit; refused her request for a lawyer; refused to dismiss the complaint "upon forming a belief she would not be retained under the jurisdiction of the juvenile courts"; and, finally, released her only pursuant to a writ of habeas corpus. The Court there reversed a dismissal of the complaint, stating:

> "Our court has held, in recent decisions, that a prosecuting attorney is immune from damages under 42 U. S. C. § 1983 . . . We adhere to our former opinions, but we cannot extend the doctrine of immunity beyond its purpose . . . The key to the immunity . . . is that the acts, alleged to have been wrongful, were . . . part of the judicial process . . . we believe however that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for the immunity . . . ceases to exist." *Id.* at 536.

The case was remanded to the trial court to determine factually whether the prosecutor's acts were closer, on a continuum, to police activity than to judicial activity, in which case, the Court indicated, "the cloak of immunity

should not protect them." *Id.* at 537. Although the views of the Ninth Circuit thus appear to be close to those of Judge Freedman, dissenting below (App. 22a-25a *infra*), the majority below, construed *Robichaud* as a case involving clear *absence* of jurisdiction in the prosecutor, rather than one in which he acted outside a "quasi-judicial" role (App. 16a *infra*). Investigation of the respective Arizona and New Jersey statutes involved in *Robichaud* and here, however, points up that the Third Circuit has articulated a "jurisdiction" test only to stand it on its head. For the Arizona prosecutor in *Robichaud* was acting against a defendant over whom he would have statutory jurisdiction; his actions, while apparently abusive and unconstitutional, were only extreme exaggerations of what a prosecutor ordinarily might do, *i.e.* file a complaint, question a defendant and prosecute vigorously. In contrast, defendant Heisel in the present case had no more jurisdiction over plaintiff Bauers under the New Jersey statutes than had the probate court cited as a clear example of usurpation of jurisdiction in this Court's decision in *Bradley v. Fisher*, 80 U. S. (13 Wall.) 335, relied on by the majority below (App. 15a-16a *infra*). For this reason, the decision below is not merely inconsistent with *Robichaud;* it announces a doctrine under which both *Robichaud* and the present case were wrongly decided.

Conflicting results of this sort are encouraged by vague and ambiguous concepts which cover them over. The "jurisdiction" doctrine promulgated below, having the double vice of unclarity and irrelevancy to the purposes of the Civil Rights Act (see part B *infra*), is a glaring example of such a concept. But, surely, where the doctrines used by the Courts of Appeals in resolution of issues central to the relief afforded by an important Federal statute are so vague and inadequate as to result in erratic and conflicting applications, review by this Court looking to the establishment of more workable doctrine is called for.

B. The Decision Below Construes This Court's Decision in Tenney v. Brandhove in Such a Way as to Make It Conflict With This Court's Later Decision in Monroe v. Pape.

Tenney v. Brandhove, 341 U. S. 367, held that Congress, in passing the Civil Rights Act, did not intend to destroy the traditional common law immunity of legislators, and dismissed an action by an individual who alleged that he had been the victim of wilful persecution by the members of a committee of the California State Legislature which had investigated him. The majority in the present case relied expressly on *Tenney*:

> "[W]e are certain that the reasoning employed and construction given R. S. 1979 by the Supreme Court in Tenney . . . is contrary to the position we adopted in Picking and requires us to overrule it." (App. 5a *infra*)

As a commentator critical of the *Tenney* decision has noted:

> "It is the *ratio decidendi* of the *Tenney* decision which is to be regretted, since it implies that common-law immunity applies in its entire scope to all types of actions under the Civil Rights Act . . ." Note, 68 HARV. L. R. 1229 (1955).

The Court below took just this sweeping and uncritical approach; believing that the Civil Rights Act should not be construed as being in derogation of the common law, including judicial immunity, it held that in the absence of express rejection of judicial immunity by Congress, such immunity was necessarily continued and encompassed prosecutors. In fact, in language which threatens *Congressional* power to protect Federal civil rights, the Court concluded that judicial immunity was not only a judge-made common-law doctrine, preserved by Congress, but in effect amounted to a Constitutional limitation on Federal legislation and that the Civil Rights Act *had* to be construed to avoid a collision with it.

But in this Court's decision in *Monroe v. Pape, supra,* "the *ratio decidendi* of the *Tenney* decision" was ignored. In *Monroe,* written ten years after *Tenney* and joined by the dissenters in the earlier case, members of the Chicago police force were held to be subject to a suit based on allegations of violations of rights guaranteed by the Fourteenth Amendment. A Court which was unanimous except for Justice Frankfurter (the author of the *Tenney* opinion) gave no attention to questions of immunity or the applicability of common law precedent. Instead, it concentrated on the legislative history showing that the Congress which passed the Civil Rights Act was concerned with ending defiance of the Fourteenth Amendment and Federal laws by mobs and State officials. The statute was intended to deal with the break-down of justice and to correct what Congress found to be a situation in which "immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."[5] The Court found in *Monroe v. Pape* that Congress intended to exercise its full power under the then recently enacted Fourteenth Amendment. See also *United States v. Price,* 86 S. Ct. 1152 (1966). There is no evidence that Congress was concerned with questions of immunity, and no indication of purpose to continue State common-law doctrines which immunized State law enforcement officials from responsibility for precisely the sort of lawlessness which the Civil Rights Act was enacted to correct. Rather, Congress was clearly bent on giving redress in cases of lawless law enforcement, of which the prosecutor, then as now, can be a principal instrument. And Congressional power to give such redress by subjecting State officers to Federal liability —their "judicial" or "quasi-judicial" status notwithstanding—appears clearly settled at least since 1879. *Ex parte Virginia,* 100 U. S. 339.

By extending the common-law immunity rationale of *Tenney* into an area where it conflicts with this Court's

5. *Cong. Globe,* 42d Cong., 1st Sess. 374 col. 3 (1871) (remarks of Representative Lowe).

reading of the legislative history of the Civil Rights Act in *Monroe v. Pape*, the Court below gave concrete demonstration of the conflict between the rationales of *Tenney* and *Monroe*. The conflict should be corrected by this Court.

C. The Decision Below Is Wrong; Because of Its Erroneous Extension of Blanket Immunity to Prosecutors It Emasculates the Civil Rights Act in the Third Circuit and, if Allowed to Stand, Elsewhere by Its Authority.

Petitioner Bauers alleged in his complaint that prosecutor Heisel knowingly or negligently usurped the jurisdiction of the Juvenile Court. He further alleged that prosecutor Heisel maliciously deprived him of a speedy trial in violation of his rights under the Constitution. If Petitioner can prove these allegations he should be permitted to recover whatever damages he can show. The Civil Rights Act was passed to make Federal law effective to curb unconstitutional abuses in enforcement of State law by State officials. A prosecutor is obviously one of the principal agents of the State who can engage in such lawless law enforcement. Nonetheless, the Court below construed the Civil Rights Act so as to limit its effect to the control of policemen, leaving other State officials unconstrained. While the Court states in dictum that there may be examples of actionable conduct on the part of prosecutors, it does not explain what sort of conduct this might be. At the same time, the broad definition it gives to a prosecutor's "jurisdiction" in the light of the actual facts of the case decided (see pp. 11-12 *supra*) gives a sweep to official immunity that, in the words of Judge Biggs, below, "emasculates the Civil Rights Act in the Third Circuit" (App. 22a *infra*).

If such blanket immunity is to remain law, then some (not so) hypothetical cases come quickly to mind to demonstrate that the obvious purpose of Congress in passing the Act will be circumvented.

For example, if a Mississippi prosecutor, in a case in which a Negro shop-lifting suspect's age precluded his trial

before the municipal court, nonetheless wilfully purported to prosecute defendant and to have him committed to the county prison farm instead of a juvenile institution for three months; and if, as a result of this illegal imprisonment, the youthful defendant was brutally treated and permanently maimed and blinded, the decision below would deny Civil Rights Act relief. It is not apparent that this application of the rationale of the Court's decision below flagrantly affronts the Congressional purpose of the Act of 1871, now 42 U. S. C. § 1983? See *Roberts v. Williams*, N. D. Miss., No. GC 6635.

Again, where the facts alleged in a civil rights complaint show a pattern of behavior by a prosecutor involving use of his office (1) to prosecute without basis members of a group—meeting on a court house lawn to encourage voter registration—in order to deter them from exercising their rights of speech and assembly; and (2) to bring unfounded charges of forgery against a Negro Notary Public who attested to certain school transfer forms used in furthering the exercise of rights under this Court's decision in *Brown v. Board of Education*, 347 U. S. 483, for the sole purpose of discouraging such exercise, the blanket formula devised by the court below would preclude redress. A contrary Congressional intent seems obvious. See *Turner v. Goolsby*, S. D. Ga., C. A. No. 1226.

Finally, the decision below fails entirely to come to grips with the problem of malicious inaction of a prosecutor—that is, unconstitutional dereliction of duty which is a dereliction precisely because the duty is *within* the prosecutor's "jurisdiction." This was precisely the problem which most concerned the Congress which enacted the Civil Rights Act, and it is once again becoming an increasingly important problem, particularly in the area of equal protection for Negroes. If a prosecutor knew that private individuals were engaging in a course of acts of violence against Negroes for the purpose of harassing and intimidating them; if, notwithstanding the fact that these individuals had committed violent crimes against Negroes and

were conspiring to commit such violent crimes in the future, the prosecutor did nothing; if, by this inaction he withdrew from Negro victims exactly that equal protection of the laws which it was the purpose of the Fourteenth Amendment and of the Civil Rights Act of 1871 to assure (see particularly REV. STAT. § 1981 (1875), 42 U. S. C. § 1986), he would clearly be acting within his "jurisdiction" and would be immune from damage actions by his victims under the decision below. *Cf. Williams v. Wallace,* 240 F. Supp. 100 (M. D. Ala. 1965). Equally clearly, his immunity would be the grossest sort of violation of the intent of Congress and would reduce the Civil Rights Act to an absurdity.

It is apparent that the decision below was wrong in precluding redress for this plaintiff and doubly wrong in areas which inevitably fall within its broad holding. Therefore this Court should grant certiorari and reverse.

CONCLUSION.

For the reasons stated above this Court should grant the petition and issue a writ of certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

ROBERT W. MARIS,
2635 Fidelity-Philadelphia Trust Building,
Philadelphia, Pennsylvania 19109,

ANTHONY G. AMSTERDAM,
3400 Chestnut Street,
Philadelphia, Pennsylvania 19104,

MELVIN WULF,
156 Fifth Avenue,
New York City, New York 10010,
Attorneys for Petitioner.

Of Counsel:

PETER HEARN,
2001 Fidelity-Philadelphia Trust Building,
Philadelphia, Pennsylvania 19109.

APPENDIX TO PETITION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15277

WILLIAM J. BAUERS, JR.,
Appellant,

v.

HERBERT T. HEISEL, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted October 5, 1965

Before BIGGS, *Chief Judge,* MARIS and STALEY, *Circuit Judges*

Resubmitted October 22, 1965

Before KALODNER, *Chief Judge,* BIGGS, MARIS, MCLAUGHLIN, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 19, 1966)

By STALEY, *Circuit Judge.*

The almost bizarre and complex factual background which prompted the present litigation has its genesis in certain events which occurred in the early 1950's. On Octo-

ber 29, 1950, William J. Bauers, Jr., the appellant herein, with two other inmates escaped from the Annandale Reformatory in Hunterdon County, New Jersey, and embarked upon a crime spree that carried him through Hunterdon and Essex Counties, New Jersey. Appellant's freedom, however, was short-lived; he was apprehended, charged and indicted for crimes committed in Essex County. He pleaded *non vult* to the charges of assault with intent to rob and auto larceny and was sentenced by the Essex County Court to four to six years on each indictment.

In the interim, the Hunterdon County Grand Jury had returned indictments against him for the escape from the reformatory and auto larceny. Although these indictments were returned on January 3, 1951, appellant was not tried for the offenses alleged therein until May of 1953. During this entire period, he was serving the sentence imposed upon him by the Essex County Court. When he eventually did appear in the Hunterdon County Court, he requested counsel, counsel was appointed, and a jury was selected. The Criminal Minutes indicate that all these events transpired prior to 10:15 A.M. on the day of trial. The factual elements surrounding the appointment of counsel are not greatly dissimilar from the case of Powell v. Alabama, 287 U.S. 45 (1932), but no issue concerning this is involved here.

After a brief recess, Bauers pleaded guilty and was sentenced immediately to a term of two to three years on each indictment, the sentences to run concurrently with any sentence he was then serving (and apparently concurrently with each other). The state prison records indicate that Bauers had completed serving the Hunterdon County sentences prior to his release on parole on the Essex County sentences.

In February of 1963, Bauers applied to the Hunterdon County Court to dismiss the 1951 indictments and to vacate the sentences imposed on him after he had pleaded guilty. He contended that the indictments were illegal because he

was a juvenile when the offenses were committed. The lower court denied his application, but the Appellate Division of the Superior Court of New Jersey reversed,[1] holding that since Bauers was not eighteen years old when the offenses were committed, jurisdiction over him was lodged exclusively in the Juvenile and Domestic Relations Court, N.J.Stat. Ann. 2A:4-14. Without a reference of the case to the county prosecutor by the juvenile court, N.J.Stat. Ann. 2A:4-15, no criminal process could be invoked against a juvenile. The court ruled that since the indictments were illegal, the pleas and sentences imposed were also illegal and should be expunged from the record.

Subsequently, Bauers instituted the present suit,[2] alleging that the defendant, Herbert T. Heisel, Jr., the Hunterdon County Prosecutor at all times relevant hereto, is liable in damages to the appellant for the deprivation of his liberty and for the denial of his right to a speedy trial. The district court ordered the complaint filed and at the same time dismissed it as "lacking in merit and pertain[ing] to the matters over which the court has no jurisdiction."[3]

On this appeal, the sole issue raised is whether the defendant, acting as the Hunterdon County Prosecutor, is immune from suit until the Civil Rights Act, 42 U.S.C.

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1. The facts recited herein are taken largely from the unreported opinion of the Superior Court, State v. Bauers, A-510-63 (May 8, 1964), which was attached to and made part of the complaint.

2. The complaint was not officially served on the defendant; instead, he received a copy of it by mail after the complaint had been dismissed. Although appellee Heisel did not appear in the district court, he has entered an appearance here and submitted a brief. Thus, the proceeding is adversary in nature. Compare Sires v. Cole, 320 F.2d 877, 878-879 & n.2 (C.A.9, 1963).

3. We cannot condone the procedure followed by the district court; the requirements of Rule 4(a) are explicit. Had appellee not appeared and filed a brief here, appellant may have been foreclosed from obtaining review of the district court's determination. Compare Urbano v. Calissi, 353 F.2d 196 (C.A.3, 1965).

§ 1983, R.S. § 1979.[4] Because a full consideration of the arguments presented requires a re-examination of the position taken by this court in Picking v. Pennsylvania R.R., 151 F.2d 240 (C.A.3, 1945), the case was submitted to the court en banc.

There is no question that Picking would be dispositive of the immunity issue presently before us. Consequently, the only portion of that opinion which we reconsider deals with the liability of a judicial officer under the Civil Rights Act of 1871. In Picking, it was decided that no immunity would be afforded to a justice of the peace, a member of the minor judiciary in Pennsylvania; however, the language of the opinion is far more sweeping:

> "* * * [W]e are not unmindful of the absolute privilege conferred by the common law upon *judicial officers* in the performance of their duties. * * * But the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so. * * * The statute must be deemed to include members of the state judiciary acting in official capacity." 151 F.2d at 250. (Emphasis added.)

While we do not choose to quarrel with the propriety of this disposition at the time it was made, we do believe that the Act even then would have been at least equally susceptible

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4. "§ 1983. Civil Action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

to a contrary construction.[5] Nevertheless, we are certain that the reasoning employed and construction given R.S. § 1979 by the Supreme Court in Tenney v. Brandhove, 341 U.S. 367 (1951), is contrary to the position we adopted in Picking and requires us to overrule it.

In Tenney, suit was brought against a committee and its members of a state legislature under R.S. §§ 1979, 1980(3), 42 U.S.C. §§ 1983, 1985(3), formerly 8 U.S.C. §§ 43, 47(3). The Court stated that the issue before it was:

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here?" 341 U.S. at 376.

After making the concededly "big assumption" "that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere," the Court answered its prophetic question:

> "* * * We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Ibid.*[6]
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> * * *
>
> "* * * [H]ere the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and * * * the statute of 1871 does not create civil liability for such conduct." *Id.* at 379.

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5. The rules of construction which we hereinafter apply could have been applied in Picking. We need not decide whether those rules would have required a result contrary to that which was there reached.

6. The Court was free to make this determination because it stated that "the limits of §§ 1 and 2 of the 1871 statute—now §§ 43 and 47(3) of Title 8—*were not spelled out in debate.*" *Id.* at 376. (Emphasis added.)

We are not alone in our belief that the construction given R.S. § 1979 in Tenney sheds new light on the situation which confronted us in Picking. Although Picking had been the cause of some immediate concern, see Note, 46 Colum. L. Rev. 614 (1946), it was not until after Tenney that its pronouncement on immunity became the object of wholesale disavowal. In fact, five circuits explicitly stated that Tenney had in effect overruled Picking. Stift v. Lynch, 267 F.2d 237 (C.A.7, 1959); Cuiksa v. City of Mansfield, 250 F.2d 700 (C.A.6, 1957), cert. denied, 356 U.S. 937 (1958); Kenney v. Fox, 232 F.2d 288 (C.A.6), cert. denied sub nom. Kenney v. Killian, 352 U.S. 855 (1956); Tate v. Arnold, 223 F.2d 782 (C.A.8, 1955); Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y., 1954), aff'd, 220 F.2d 758 (C.A.2), cert. denied, 350 U.S. 867 (1955); Francis v. Crafts, 203 F.2d 809 (C.A.1), cert. denied, 346 U.S. 835 (1953). This view has also been adopted by several district courts in this circuit. Woodruff v. City & County of Philadelphia, 38 F.R.D. 468 (E.D.Pa., 1965); Hardy v. Kirchner, 232 F. Supp. 751 (E.D.Pa., 1964); Ellis v. Wissler, 229 F. Supp. 196 (E.D.Pa., 1964); Perkins v. Rich, 204 F. Supp. 98 (D.Del., 1962), aff'd per curiam, 316 F.2d 236 (C.A.3, 1963); Ginsburg v. Stern, 125 F. Supp. 596 (W.D.Pa., 1954), aff'd on other grounds, 225 F.2d 245 (C.A.3, 1955).

Though we choose to make an independent analysis of the issue before us, our rationale differs little from what was said in Tate v. Arnold, supra:

> "* * * Since the doctrine of judicial immunity is at least as well grounded in history and reason as is the rule of legislative immunity, the courts have interpreted the language * * * from Tenney * * * as authority for holding that the Civil Rights Act did not abrogate judicial immunity." 223 F.2d at 785.

and in Francis v. Crafts, supra:

> "* * * [T]he Picking case was decided in 1945 without benefit of the illumination and compelling

analogy to be found in the opinion of the Supreme Court in Tenney v. Brandhove, supra, which came down several years later. In view of the discussion in the latter case, we have no doubt that the Third Circuit would no longer feel obliged, as it did in the Picking case, to read the Civil Rights Act in such literal and unqualified manner as to impose liability for damages upon a state judicial officer for acts done in the exercise of his judicial function. Certainly it would be absurd to hold, in the application of the Civil Rights Act, that judicial officers of a state stand in any less favorable position than do state legislators, in respect to immunity from civil liability for acts done in their official capacity." 203 F.2d at 812.

Rather than rely on the plethora of cases which have held judicial officers to be immune from suit under the Civil Rights Act,[7] we believe that two maxims, one of statu-

7. Pierson v. Ray, 352 F.2d 213 (C.A.5, 1965) (police justice); Byrne v. Kysar, 347 F.2d 734 (C.A.7, 1965) (physician-members of court appointed medical commission and assistant state's attorney); Haldane v. Chagnon, 345 F.2d 601 (C.A.9, 1965) (judges and bailiff); Arnold v. Bostick, 339 F.2d 879 (C.A.9, 1964), cert. denied, 382 U.S. 858 (1965) (state judge); Rhodes v. Meyer, 334 F.2d 709 (C.A.8), cert. denied, 379 U.S. 915 (1964) (state supreme court justices, state district judges, prosecuting attorneys, clerks of court, prison officials, members of state integrated bar, sheriffs and law enforcement officers); Harvey v. Sadler, 331 F.2d 387 (C.A.9, 1964) (judges); Agnew v. Moody, 330 F.2d 868 (C.A.9), cert. denied, 379 U.S. 867 (1964) (judges and prosecuting attorneys); Scolnick v. Lefkowitz, 329 F.2d 716 (C.A.2), cert. denied, 379 U.S. 825 (1964) (state attorney general and assistant attorney general); Harmon v. Superior Court, 329 F.2d 154 (C.A.9, 1964) (state judges, district attorney, sheriff, county clerk, probation officer, court trustee, county auditor and county treasurer); Hurlburt v. Graham, 323 F.2d 723 (C.A.6, 1963) (justice of the peace and prosecuting attorney); Puett v. Detroit, 323 F.2d 591 (C.A.6, 1963) (municipal judge, assistant prosecuting attorney and corporation counsel); Sires v. Cole, 320 F.2d 877 (C.A.9, 1963) (state judge, prosecuting attorney and deputy prosecuting attorney); Phillips v. Nash, 311 F.2d 513 (C.A.7, 1962), cert. denied, 374 U.S. 809 (1963) (state's attorney); Gately v. Sutton, 310 F.2d 107 (C.A.10, 1962) (state supreme court judges); Cooper v. Wilson, 309 F.2d 153 (C.A.6, 1962) (private attorney); Wise v.

tory construction and the other of judicial restraint, when applied and coupled with Tenney, clearly indicate that judicial immunity was not abrogated by the Act.

Chicago, 308 F.2d 364 (C.A.7, 1962), cert. denied, 372 U.S. 944 (1963) (city prosecuting attorneys); Saier v. State Bar of Michigan, 293 F.2d 756 (C.A.6), cert. denied, 368 U.S. 947 (1961) (state supreme court justices); Kostal v. Stoner, 292 F.2d 492 (C.A.10, 1961), cert. denied, 369 U.S. 868 (1962) (state judge and prosecuting attorney); Smith v. Dougherty, 286 F.2d 777 (C.A.7), cert. denied, 368 U.S. 903 (1961) (judge, state's attorney and assistant state's attorneys); Johnson v. MacCoy, 278 F.2d 37 (C.A.9, 1960) (judge); Bartlett v. Weimer, 268 F.2d 860 (C.A.7, 1959), cert. denied, 361 U.S. 938 (1960) (court appointed doctor); Larsen v. Gibson, 267 F.2d 386 (C.A.9), cert. denied, 361 U.S. 848 (1959) (state supreme court justices); Stift v. Lynch, 267 F.2d 237 (C.A.7, 1959) (state's attorney, assistant state's attorney and justice of the peace); Carpenter v. Dethmers, 253 F.2d 131 (C.A.6, 1958) (chief justice and clerk of state supreme court); Gay v. Heller, 252 F.2d 313 (C.A.5, 1958) (state judge and court appointed curator); Cuiksa v. City of Mansfield, 250 F.2d 700 (C.A.6, 1957), cert. denied, 356 U.S. 937 (1958) (municipal judge); Holmes v. Henderson, 249 F.2d 529 (C.A.9, 1957) (state court judge); Ryan v. Scoggin, 245 F.2d 54 (C.A.10, 1957) (state judge); Skinner v. Nehrt, 242 F.2d 573 (C.A.7, 1957) (state judge); Peckham v. Scanlon, 241 F.2d 761 (C.A.7, 1957) (superior court judge, assistant state's attorneys and court reporter); Kenney v. Fox, 232 F.2d 288 (C.A.6), cert. denied sub nom. Kenney v. Killian, 352 U.S. 855 (1956) (state judge and prosecuting attorney); Tate v. Arnold, 223 F.2d 782 (C.A.8, 1955) (justice of the peace); Eaton v. Bibb, 217 F.2d 446 (C.A.7, 1954), cert. denied, 350 U.S. 915 (1955) (state's attorney); Jennings v. Nester, 217 F.2d 153 (C.A.7, 1954), cert. denied, 349 U.S. 958 (1955) (state's attorney); Dunn v. Gazzola, 216 F.2d 709 (C.A.1, 1954) (police officer, superintendent of reformatory and state commissioner of correction acting pursuant to court order); Francis v. Lyman, 216 F.2d 583 (C.A.1, 1954) (commissioners of correction and prison superintendents acting jursuant to judicial decree); Cawley v. Warren, 216 F.2d 74 (C.A.7, 1954) (state's attorney, his first assistant and grand jury foreman); Francis v. Crafts, 203 F.2d 809 (C.A.1), cert. denied, 346 U.S. 835 (1953) (state judge); Woodruff v. City & County of Philadelphia, 38 F.R.D. 468 (E.D. Pa., 1965) (judge and magistrate); Hardy v. Kirchner, 232 F.Supp. 751 (E.D. Pa., 1964) (Judge, district attorney and alderman); Ellis v. Wissler, 229 F.Supp. 196 (E.D. Pa., 1964) (judge and district attorney); Ray v. Huddleston, 212 F.Supp. 343 (W.D. Ky., 1963), aff'd, 327 F.2d 61 (C.A.6, 1964) (state judge); Perkins v. Rich, 204 F.Supp. 98 (D. Del., 1962), aff'd per curiam, 316 F.2d 236 (C.A.3, 1963)

First, it is well settled that a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment. Mobile Gas Service Corp. v. FPC, 215 F.2d 883 (C.A.3, 1954), aff'd, 350 U.S. 332 (1956); American District Telegraph Co. v. Kittleson, 179 F.2d 946 (C.A.8, 1950); Scharfeld v. Richardson, 133 F.2d 340 (C.A.D.C., 1942). There can be little doubt that the concept of judicial immunity is deeply rooted in Anglo-American law. In Yates v. Lansing, 5 Johns. R., (N.Y.) 282, 291 (Sup. Ct. of Judicature, 1810), Chief Justice Kent noted that:

> "* * * It [judicial immunity] is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government."

His concluding remarks—that the statute there being construed could not be read as impliedly abrogating judicial immunity—are peculiarly applicable here: "Ought such a sacred principle of the common law * * * be subverted without an express declaration to that effect?" *Id.* at 296. For a further review of the historical precedents on judicial immunity see Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347-354 (1871).

The statute before us also has no express declaration to that effect; nor does the legislative history adequately support the conclusion that Congress intended to dissolve

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(judge); Rhodes v. Houston, 202 F.Supp. 624 (D. Neb.), aff'd, 309 F.2d 959 (C.A.8, 1962), cert. denied, 372 U.S. 909 (1963) (district judge, prosecuting attorney, clerk of court, and in certain instances law enforcement officers and wardens); Ginsburg v. Stern, 125 F.Supp. 596 (W.D. Pa., 1954), aff'd on other grounds, 225 F.2d 245 (C.A.3, 1955) (chief justice and prothonotary of state supreme court); Morgan v. Sylvester, 125 F.Supp. 380 (S.D.N.Y., 1954), aff'd, 220 F.2d 758 (C.A.2), cert. denied, 350 U.S. 867 (1955) (trial and appellate judges); Souther v. Reid, 101 F.Supp. 806 (E.D. Va., 1951) (state judge).

judicial immunity.[8] These factors, when considered in conjunction with the Supreme Court's determination that legis-

8. Our search of the legislative history of R.S. § 1979 bears out the Supreme Court's statement in Tenney, quoted at note 6, supra, that "the limits of §§ 1 and 2 of the 1871 statute * * * were not spelled out in debate." There are, however, two statements by opponents to H.R. 320, the House version of R.S. § 1979, which deserve mention.

Congressman Arthur of Kentucky assailed § 1 of the Bill, stating:

> "Hitherto, in all the history of this country and of England, no judge or court has been held liable, civilly or criminally, for judicial acts * * * . Under the provisions of this section every judge in the State court and every officer thereof, great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him * * *." Cong. Globe, 42nd Cong., 1st Sess. (1871) 365-366.

Congressman Lewis, also of Kentucky and another opponent of the Bill, charged that:

> "By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in a Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be * * * ." *Id.* at 385.

Although these statements appear strong on the surface, under careful scrutiny they stand for little more than opposition remarks. The Supreme Court has recently reiterated the weight which should be accorded such remarks:

> "* * * [W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.' Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-395; see also Mastro Plastics Corp. v. Labor Board, 350 U.S. 270, 288; United States v. Calamaro, 354 U.S. 351, n. 9, at 358." NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 66 (1964); NLRB v. Thompson Products, Inc., 141 F.2d 794 (C.A.9, 1944).

Unanimity of those favoring and those opposing legislation is, of course, of greater value. Apex Hosiery Co. v. Leader, 310 U.S. 469, n. 15 at 495 (1940). The only situation where opponents' statements have relevance is where the proponents made no response to them. Arizona v. California, 373 U.S. 546, n. 85 at 583 (1963). The circumstances surrounding the debate on H.R. 320, especially as to the

lative immunity was not inimical to the purpose of the Act, lead to the inescapable conclusion that the Act was not intended to be in derogation of the common law.

The second basis upon which we ground our conclusion that the traditional concept of judicial immunity remained undisturbed by the enactment of the Civil Rights Act finds its support in the maxims of judicial restraint as classically announced by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (concurring opinion). Characterizing the approach a court should take when confronted with a case such as the one we are presently considering, he stated that:

> "* * * [I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191; Light v. United States, 220 U.S. 523, 538." 297 U.S. at 347.

This technique was employed by the Supreme Court in Tenney, and the constitutional issue of whether Congress had the power to abrogate legislative immunity was avoided by the Court's conclusion that Congress did not intend to abolish the immunity.

In Tenney, the Court did not spell out the particular constitutional barrier which might be raised to void such Congressional action. Though we would not be compelled to go further, we choose to spell out at least one of perhaps several constitutional questions which would necessarily arise if the Act were construed so as to abrogate judicial immunity.

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two quoted speeches, indicate that responses could not be expected. In the first place, the speeches on the legislation which eventually emerged as R.S. § 1979 consume hundreds of pages of the Congressional Globe. Even more important is that the two statements quoted above were made at times when response would have been unlikely. The first was made at a night session, while the second was delivered during a Saturday session.

Article 4, § 4 of the United States Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government * * *." The framers of the Constitution clearly evinced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 et seq., 494 et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary in the various States, and consequently deprive them of a republican form of government. The language of the Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, lends support to our conclusion.

> "* * * [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself, Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and *would destroy that independence without which no judiciary can be either respectable or useful.*" (Emphasis added.)

Our belief that the Act would violate the Guarantee Clause if construed to abrogate judicial immunity does not necessarily mean that either this court or the Supreme Court would have the power to remedy the wrong. The Supreme Court has held in a long line of cases, beginning with Luther v. Borden, 48 U.S. (7 How.) 1 (1849), that Congress is charged with the enforcement of Art. 4, § 4. Alleged violations of this clause have been held to present "political questions" which are non-justiciable. See Baker v. Carr, 369 U.S. 186, 218-226 (1962). Even if this case fell within that class labelled "non-justiciable," we believe that would be all the more reason why we should not impute to Congress the intention to blatantly violate that trust.

Despite the wealth of cases holding Art. 4, § 4 violations to be non-justiciable, we think that none would govern the instant case. The numerical weight of those cases have involved state action, but as the Court pointed out in Baker v. Carr, supra, challenges to Congressional action based upon the clause have likewise been held non-justiciable. *Id.* at 224-225. The cases cited by the Court, however, involve extraordinary circumstances which would not be present if the Civil Rights Act were construed to abolish judicial immunity. The absence of any overbearing political factor and the presence of substantial precedent to serve as criteria might well require a whole new analysis of the Guarantee Clause and non-justiciability. Fortunately, our task is only to state the problem, not to resolve it. Compare the majority opinion in Baker v. Carr with Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); compare the concurring opinion of Douglas, J., 369 U.S. at 241, with the dissenting opinion of Frankfurter, J., *id.* at 266.

The construction we place on the Civil Rights Act not only avoids this constitutional issue, but is also in accord with the Court's mandate that in Civil Rights Act cases the "lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the States and the federal government * * *.'" Stefanelli v. Minard, 342 U.S. 117, 121 (1951). See also Note, 68 Harv. L. Rev. 1229, 1231 (1955); Note, 36 Ind. L. J. 317, 334-335 (1961).

In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions. See Monroe v. Pape, 365 U.S. 167 (1961); Comment, 18 Ark. L. Rev. 81, 84-92 (1964). Analogy could support either conclusion, but we believe that both reason and precedent require that a prosecuting attorney should

be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent, Griffin v. United States, 295 Fed. 437, 439-440 (C.A.3, 1924); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench.[9] This reasoning is nearly as well established in Anglo-American law as judicial immunity itself. Yaselli v. Goff, 12 F.2d 396 (C.A.2, 1926), aff'd, per curiam "on the authority of Bradley v. Fisher * * * [and] Alzua v. Johnson, 231 U.S. 106, 111," 275 U.S. 503 (1927), and numerous cases and authorities cited therein. Prosecuting attorneys who have been sued under the Civil Rights Act, R.S. § 1979, have likewise been held immune. Laughlin v. Rosenman, 163 F.2d 838 (C.A.D.C., 1947); Kenney v. Fox, supra, and other cases cited in note 7, supra.

The case of Egan v. City of Aurora, 365 U.S. 514 (1961), does not require a contrary result. In that Civil Rights Act case, the Supreme Court in a per curiam opinion affirmed in part and vacated and remanded to the court of appeals the causes against certain individual defendants (one of whom was corporation counsel for the City of Aurora, see Egan v. City of Aurora, 275 F.2d 377, 378 (C.A.7, 1960)) because the opinion of the Court of Appeals

9. We find the traditional arguments in support of immunity applicable here; they are "(1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits [which would require inordinate private record keeping, Bradley v. Fisher, 80 U.S. (13 (Wall.) at 349]; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce honesty and efficiency of public officers." Note, 66 Harv. L. Rev. 1285, 1295, n. 54 (1953).

was "not explicit as respects the ground for dismissing the complaint * * *." 365 U.S. at 515. This disposition, especially since the Court failed to expressly mention corporation counsel as an individual defendant, can hardly be cited for the proposition that a prosecuting attorney is not immune.[10]

The immunity of a prosecutor, however, is not without limitation; it is not absolute. The immunity of judges, from which the immunity of prosecutors is derivative, does not extend to acts which are clearly outside their jurisdiction. In Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-352, the Supreme Court established the guidelines for determining the scope of judicial immunity:

> "* * * [J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. * * * Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain

10. The failure of the Seventh Circuit to remand to the district court the cause against the corporation counsel substantiates this position, 291 F.2d 706 (1961); see also Phillips v. Nash, 311 F.2d 513 (C.A.7, 1962), cert. denied, 374 U.S. 809 (1963).

> district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction * * *."

The clear-absence-versus-mere-excess-of-jurisdiction distinction has, in substance, been adopted and applied in Civil Rights Act cases brought against judges and other judicial officers. Robichaud v. Ronan, 351 F.2d 533 (C.A.9, 1965); Corsican Productions v. Pitchess, 338 F.2d 441 (C.A.9, 1964); Spires v. Bottorff, 317 F.2d 273 (C.A.7, 1963); Lewis v. Brautigam, 227 F.2d 124 (C.A.5, 1955). Because immunity is conferred on an individual solely by virtue of the office he holds, reason requires us to adopt a rule which does not provide immunity for those acts which are done clearly outside the authority or jurisdiction of the office.

Accepting, as we must, the truth of the allegations as pleaded in appellant's complaint, we now proceed to examine those facts within the legal framework we have set forth above. The main thrust of the complaint is that the defendant knew or should have known that appellant had not reached the age of eighteen when the alleged offenses were committed, and that in procuring the indictments against him and the resulting pleas, sentences and incarceration, appellant was denied his liberty without due process. Assuming arguendo that this denial of liberty and the denial of a speedy trial abridged appellant's constitutional rights,[11] so as to bring him within 42 U.S.C. § 1983 in that regard, we cannot perceive that the defendant acted clearly outside his jurisdiction in either matter.

11. We think it highly unlikely that defendant's failure to proceed in accordance with the New Jersey statute, N.J.Stat.Ann. 2A:4-14—

We have already indicated that the primary responsibility of a prosecutor is to vindicate the wrongs which have been committed against society. This is precisely what appellee was doing when the denial of appellant's liberty occurred. The mere fact that the New Jersey Legislature had excised from his responsibility the prosecution of individuals who were under the age of eighteen when they committed acts which would otherwise be punishable offenses does not indicate that he was acting clearly outside his jurisdiction. On the contrary, it would be difficult to envision a case which was as close to his jurisdiction, but, yet, in excess of it.

As to the denial of a speedy trial, even if we assume that the defendant was responsible for the delay, we believe that motions for continuances or other causes of delay are well within the jurisdiction of the prosecutor.

Having decided these substantive questions, one further matter remains for our consideration. As this case comes before us, its posture is not greatly dissimilar from that of Tenney v. Brandhove, as it came before the Ninth Circuit, 183 F.2d 121 (1950), and the Supreme Court, 341 U.S. 367. The district court in Tenney had dismissed the complaint for failure to state a cause of action. The Supreme Court reversed the Ninth Circuit and affirmed the district court's dismissal for failure to state a cause of action. We likewise affirm the judgment of the district court on the grounds that the complaint fails to state a cause of action.

The judgment of the district court will be affirmed.

4-15, in and of itself, resulted in a denial of due process; nor would this appear to give rise to a denial of equal protection. But see Miller v. Rhay, Supreme Court Docket No. 1180, cert. granted, April 4, 1966, 34 L.W. 3341.

We also believe that appellant's denial of a speedy trial probably did not violate his constitutional rights. See Ciesielski v. Ohio, Supreme Court Docket No. 920, appeal dismissed March 7, 1966, 34 L.W. 3303; United States ex rel. Von Cseh v. Fay, 313 F.2d 620 (C.A.2, 1963) and cases and authorities cited therein; see also United States v. Ewell, — U.S. — (Feb. 23, 1966).

KALODNER, *Chief Judge,* concurring in the result

I concur in the overruling of our holding in Picking v. Pennsylvania R. Co., 151 F.2d 240 (1945).

I also concur in the affirmance of the District Court's Order dismissing the Complaint for the sole reason that in my opinion the sweep of the Civil Rights Act, 42 U.S.C.A. Sec. 1983, R.S. Sec. 1979 does not extend to a cause of action such as that which the Complaint asserts.

Since I am of the view that the Complaint fails to state a cause of action under the Civil Rights Act, I do not reach the majority's holding with reference to the extension of the doctrine of "judicial immunity" to prosecuting attorneys.

HASTIE, *Circuit Judge,* concurring in the result.

I agree that *Picking v. Pennsylvania Railroad,* 3d Cir., 1945, 151 F.2d 240, should be overruled. But I do not share the view of the majority that the doctrine of "judicial immunity" protects whatever acts of a public prosecutor are "done in his official capacity" or are not "clearly outside his jurisdiction".

However, I am satisfied that the present complaint, charging a prosecutor with erroneously prosecuting the plaintiff as an adult when "he should have known that the plaintiff was under the age of 18, does not state such a deprivation of a federally secured right as is comprehended by the original Civil Rights Act, 42 U.S. Code § 1983, formerly R.S. § 1979, upon which this claim is predicated.

Thus, I agree that the complaint here fails to state a cause of action, but for a reason different from that upon which the majority place principal reliance.

BIGGS, *Circuit Judge*, dissenting.

There are two issues presented by this appeal: first, is the defendant, County Prosecutor Heisel, immune from suit brought under the Third Civil Rights Act, 42 U.S.C. § 1983, R.S. § 1979, and, second, does the complaint state a cause of action against him?

To deal with the second question first, I had thought that this was answered adequately and in the plaintiff-appellant's favor by our decisions in Basista v. Weir, 340 F.2d 74 (1965), and Anderson v. Haas, 341 F.2d 497 (1965). In the Anderson case Chief Judge Staley concluded, *id.* at 502, that the contention of the police officers that they acted in good faith and without malice could be no defense in a civil action brought under Section 1983. But surely and very finally the scope of the Civil Rights Acts has been defined in United States v. Price, — U.S. — (1966), and the opinion of the Supreme Court in Price certainly is not in accord with the opinion of this court and requires reversal of this tribunal's decision unless Prosecutor Heisel be found to be immune from a suit such as that at bar. By its Price decision the Supreme Court has revitalized the "Reconstruction" Civil Rights Acts.

In respect to the immunity issue it was pointed out in Picking v. Pennsylvania R. Co., 151 F.2d 240, 250 (3 Cir. 1945), now expressly overruled by this court, that the phrase "every person" of Section 1983 and the phrase "any person" of Section 1 of the Third Civil Rights Act, Act of April 20, 1871,[1] were purposely made as broad in definition as was possible.

On reading the legislative history of the Civil Rights Acts I find it is impossible to conclude that Congress created any barrier of state office, other than legislative, behind which federal power, conferred by the Acts, was not

1. Act of April 20, 1871, 17 Stat. 13.

intended to reach.[2] The legislative history of the Third Civil Rights Act alone makes this plain.[3] The statements of Senator Pool, Appendix to the Price opinion, — U.S. —, *et seq.*, directed to the Enforcement Act of 1870, 16 Stat. 140, and the Enforcement Act itself, are illuminating. Mr. Justice Fortas points out in his opinion, *id. supra* at —, that the Enforcement Act "included a reenactment of the Civil Rights Act of 1866 which is now [18 U.S.C.] section 242". I think that all of the Civil Rights Acts must be deemed to have been based on the same congressional considerations and that the rights secured and protected by the Acts are the same in scope whether they are to be enforced by criminal or civil sanctions. I conclude, therefore, that Senator Pool's statement in respect to the Enforcement Act are pertinent in construing the statute *sub judice*.

Senator Pool, after referring briefly but emphatically to the conditions which had brought Congress to the enactment of the First Civil Rights Act, 14 Stat. 27, stated: "There is no legislation that could reach a State to prevent its passing a law [in denigration of the First Civil Rights Act]. It [federal legislation] can only reach the individual citizens of the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State. If you pass an act by which you make it an indictable offense for an officer to execute any law of the State by which he trespasses upon

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2. I think that this court's reliance on Tenney v. Brandhove, 341 U.S. 367 (1951), is misplaced. In the cited case, the Supreme Court was dealing with the liability of members of the California Legislature under the Civil Rights Acts embraced by 8 U.S.C. §§ 43 and 47(3), and not with liability of state law enforcement officers. Compare Eastern R. Conf. v. Noerr Motors, 365 U.S. 127 (1961), in which the Supreme Court adjudicated rights of parties under §§ 1 and 2 of the Sherman Act and § 4 of the Clayton Act.

3. For the legislative history of the Third Civil Rights Act, see The Congressional Globe, 42nd Congress, 1871, First Session, Part 1, report on H.R. No. 320, p. 317 and debate, pp. 385, 395, 461 and 495, and Part 2, Appendix, pp. 86, 113, 209, and 216-217.

any of these rights of the citizen it operates upon him as a citizen, and not as an officer."

The last sentence quote, in my view, indicates that Congress intended the Civil Rights Acts to be applicable to every person as citizen and not as state officer. An official action offending the Acts must be deemed to have been committed by a citizen *qua* citizen.[4] Under such a view there can be no immunity by virtue of state office, legislative office excepted. The view expressed in the preceding paragraph seems to be in accord with the pronouncement of Mr. Justice Fortas in the Price opinion, *id.* at —, as follows: "He [Senator Pool] acknowledged that the States as such were beyond the reach of the punitive process, and that legislation must therefore operate upon individuals. He made it clear that 'It matters not whether these individuals be officers or whether they are acting on their own responsibility.' We find no evidence whatever that Senator Pool intended that § 241 should not cover violations of Fourteenth Amendment rights, or that it should not include State action or actions by state officials." At an earlier point in respect to the reach of 18 U.S.C.A. § 241, Mr. Justice Fortas stated: "We find no basis whatsoever for a judgment of Solomon which would give to the statute less than its words command." I can entertain no doubt that prosecutors are "commanded" by "words".

The majority opinion contains the interesting suggestion based upon Article IV, Section 4, of the Constitution, that the Acts would be unconstitutional if the construction put upon them in this dissenting opinion is correct. The theory espoused by the majority is that immunity is a basic right of the judiciary under the doctrine of separation of powers, and that any attempt by Congress to limit or abolish that immunity would unconstitutionally encroach on the judicial branches of our state governments

4. With the exception of a citizen who is a legislative officer in accordance with the principles enunciated in Tenney v. Brandhove, 341 U.S. 367 (1951), as stated previously in the body of this opinion.

so that a republican form of government would no longer exist. I agree that the principle of judicial immunity is part of the Anglo-American law. It was created by judicial decisions for policy reasons. See, for example, Yaselli v. Goff, 12 F.2d 396 (2 Cir. 1926). But the principle of judicial immunity, judge made, cannot raise a constitutional issue as the majority asserts. A principle established by decisional law can be overturned by an act of Congress or of a legislature. But aside from the foregoing, we are concerned here with immunity of a prosecutor, not with that of a judge, though the majority opinion by way of *dicta* seems to extend immunity not only to judges but also to police officers, albeit with a jurisdictional qualification as to the latter which I believe is inoperable or non-existent. That police officers do not have immunity in civil rights suits was decided by Monroe v. Pape, 365 U.S. 167, 184-85 (1961).

Assuming that an issue of constitutionality is reached here it should be decided only upon a full record and only if necessary. See Villa v. Van Schaick, 299 U.S. 152, 155-56 (1936), and Honeyman v. Hanan, 300 U.S. 14, 25-26 (1937). The fact is that the present decision emasculates the Civil Rights Acts in the Third Circuit. This is unfortunate for there is need for them in this Circuit as elsewhere.

For these reasons, I must respectfully dissent.

FREEDMAN, *Circuit Judge,* dissenting.

I am not prepared to hold that a prosecutor, as such, enjoys the full privilege of a judicial officer. A prosecutor, although a public official, is in the actual trial of a case simply the government's lawyer, just as his adversary is the defendant's lawyer. Both of them are bound by the standards of professional ethics, although the prosecutor often is called a quasi-judicial officer, a characterization which describes his obligation to his client, the State, not

to seek to win a case against an innocent defendant or to win a good case by unfair means.

I would not equate the trial conduct of a prosecutor with the adjudicatory role of a judge, whose duties involve a process so delicate that it would be undesirable to subject him to inquiry by suit under the Civil Rights Act. An advocate stands in a totally different position and I do not believe that the state's advocate should be any more immune than the defendant's advocate, who is licensed by the State, or its police officers. I therefore dissent from the view that a prosecutor is in all cases immune from liability under the Civil Rights Act.

On the other hand, there may well be aspects of the duties of a prosecutor in which he must exercise his judgment in a manner which is truly quasi-judicial in nature. That area therefore should be included within the scope of a partial, quasi-judicial immunity. The prosecutor's decision as to the appropriate court in which prosecution should be had is a matter in which I would hold a prosecutor immune unless there appears an intentional and malicious abuse of his authority.[1] It is in such an area, and to this extent only, that I would give recognition to the quasi-judicial aspect of the prosecutor's function.

In the present case the complaint is not made against the prosecutor's conduct in the trial of the case, but rather in his choice of the court before which the plaintiff should be tried. This charge appears to me to fall within an area of partial immunity. However, since this boundary between partial immunity and full liability would now be delineated for the first time and since we are dealing with an inartistically drawn complaint framed by a layman pro se, I

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1. Cf. Dombrowski v. Pfister, 380 U.S. 479, 490 (1965), where the Court said that a claim under the Civil Rights Act was made out where it was alleged that state officials, including the attorney general, a district attorney and a member of the legislature, had invoked and were threatening to invoke criminal proceedings in bad faith and without any hope of success, but only to discourage plaintiffs' civil rights activities.

would not dismiss it finally but would afford the plaintiff an opportunity to amend in the court below.[2]

I am reinforced in this view by the circumstances in which the decision below was rendered. As the record comes to us the district judge simply entered an order directing the dismissal of the complaint because the court had no jurisdiction and at the same time ordered the clerk to file the complaint together with the order of dismissal. As we pointed out in *Urbano v. Calissi,* 353 F.2d 196 (3d Cir. 1965), where a similar order was entered and where, as here, no service was made on the defendants, plaintiff is entitled to an opportunity to be heard in the court below and defendants have appropriate means under the Rules of Civil Procedure to move for the dismissal of the action or for summary judgment. Thereafter we will have the benefit of the conclusion the district judge arrived at after hearing the contending parties on the jurisdictional question and if need be, on the merits.[3] This procedural re-

2. The complaint alleges that the defendant "knew or should have known" that plaintiff was not yet eighteen years of age at the time of the commission of the alleged offenses and therefore was a juvenile subject to the exclusive jurisdiction of the juvenile and domestic relations court. It also alleges that "defendant's malicious disregard for the aforesaid duties of his office caused plaintiff to be denied a speedy trial", notwithstanding five letters from plaintiff over a period from approximately May, 1951 to April, 1953, all requesting speedy trial.

3. We said in Urbano: "It appears that none of the defendants has been served with the complaint. There is therefore no party defendant of record in the proceeding. As a result, when the case was submitted to us on appeal there were no appellees before the court. In a case of this kind it is desirable that the action be permitted to proceed in the customary manner. Plaintiff was entitled to an opportunity to be heard on the legal questions involved in the court's conclusion that the complaint should be dismissed. See Harmon v. Superior Court, 307 F.2d 796 (9 Cir. 1962). The defendants have appropriate means under the Rules of Civil Procedure to move for the dismissal of the action or for summary judgment. At that time both sides will have full opportunity to present their contentions and whatever conclusion the District Judge may arrive at on the merits (See Sheridan v. Williams, 333 F.2d 581 (9 Cir. 1964)) will have the benefit of the views of the contending parties on the merits and on the jurisdictional question."

quirement seems to me especially desirable in so significant a question as the scope of a prosecutor's immunity from liability under the Civil Rights Act.

I would therefore vacate the dismissal of the complaint and remand the cause for proceedings in the regular course of litigation under the Rules of Civil Procedure.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed January 26, 1965, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF,
Clerk.

May 19, 1966.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Circuit Judge Biggs dissents.

By THE COURT,

STALEY,
Chief Judge.

Dated: June 9, 1966.

COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

1. Plaintiff is a citizen of the State of Washington, presently incarcerated in the New Jersey State Prison at Trenton under the authority of Principal Keeper Howard, and defendant is a citizen of the State of New Jersey, an attorney at law with offices at 32 Bridge Street, Frenchtown, New Jersey. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000).

2. The instant action is brought pursuant to Title 28 U. S. C. Sec. 1343, Title 42 U. S. C. Sec. 1983, the United States Constitution as Amended and Amendment Fourteen.

3. At all times relevant to this complaint defendant was the lawfully-appointed Prosecutor of Hunterdon County (New Jersey) charged with the public duty, among others, of lawfully prosecuting criminal defendants, of whom plaintiff was one, and further charged with exercising diligence with regard to the constitutional and other lawful rights of those same criminal defendants.

4. Acting under color of law defendant willfully and maliciously deprived plaintiff of his rights, privileges and immunities as secured by the laws and Constitution of the State of New Jersey and the Constitution of the United States as amended, all to plaintiff's irreparable damage and detriment.

5. Defendant, acting in his official capacity aforesaid, caused the Hunterdon County (New Jersey) Grand Jury, January 3, 1951, to hand down two illegal criminal indictments against plaintiff, Nos. 3733 and 3733A, for escape and auto larceny respectively. (See Exhibit "A")

6. Defendant knew or should have known that at the time of the commission of the alleged crimes, October 28-

29, 1950, charged to plaintiff in the aforesaid indictments, plaintiff was not 18 years of age and therefore a juvenile subject to the exclusive jurisdiction of the Juvenile and Domestic Relations Court of Hunterdon County (New Jersey), pursuant to New Jersey Statutes 2A:4-14 and 2A:4-15. (See Exhibit "A")

7. Further, defendant's malicious disregard for the aforesaid duties of his office caused plaintiff to be denied a speedy trial on the aforesaid indictments in violation of plaintiff's constitutional right pursuant to the Sixth Amendment. After indictment defendant ignored 5 letters from plaintiff over a period of 24 months, from approximately May, 1951, to April, 1953, all requesting speedy trial. Plaintiff found it necessary to appeal to the Assignment Judge of Hunterdon County (New Jersey) before trial could be had.

8. On May 21, 1953, without notification, plaintiff was brought to trial before the County Court of Hunterdon County (New Jersey) on the aforesaid indictments. Counsel was assigned and a jury selected the same morning. Whereupon, defendant, in the presence of the Court, belligerently threatened, "Don't forget, if you're convicted, you're a third offender!" As defendant stalked off, plaintiff's newly-appointed defense counsel urgently advised plaintiff to change his plea to guilty. In fact, plaintiff had never been arraigned or pleaded to the charges. Plaintiff pleaded guilty and was that same day sentenced to terms of 2 to 3 years on motion of defendant who knew or should have known that a pre-sentence report was mandatory, pursuant to New Jersey Revised Rule 3:7-10(b). As Exhibit "B", attached, evidences, the circumstances were shocking to any sense of justice.

9. Pursuant to the aforesaid sentences Plaintiff was illegally imprisoned in the New Jersey State Prison for a period of 22 months and 15 days.

10. Eventually, plaintiff was made aware of the violations of his constitutional rights, whereupon, on May 8, 1964, the Appellate Division of the Superior Court of New Jersey ruled that the said indictments, convictions and sentences were illegal and had been unlawfully obtained and should be expunged from the records. (See Exhibit "A")

11. On June 15, 1964, the aforesaid indictments, convictions and sentences were ordered expunged from the record by the Hunterdon County (New Jersey) Superior Court in compliance with the aforesaid reversal. (Exhibit "C") The successful conclusion of the matter gives rise to the instant action and complaint by plaintiff.

12. At all times material to plaintiff's cause of action, as hereinbefore set forth, plaintiff was deprived of his rights, privileges and immunities as secured to him by the Constitution and laws of the State of New Jersey and of the United States in that, first, he was denied his right to be dealt with as a juvenile in a Court of proper jurisdiction as provided by law; second, he was denied a speedy trial, equal protection of law and due process at all relevant times; and, third, he was incarcerated illegally for a period of 22 months and 15 days, as hereinbefore set forth.

13. Defendant caused or permitted the aforesaid events to occur in violation of plaintiff's rights as provided by law pursuant to Title 28 U. S. C. Sec. 1343, Title 42 U. S. C. Sec. 1983, the United States Constitution as Amended and Amendment 14.

14. The attached Exhibits "A", "B", "C" are hereby made a part of this complaint in their entirety.

15. In addition to actual, compensatory and nominal damages herein recoverable, plaintiff requests punitive or exemplary damages in view of the gross derelictions of duty on the part of defendant, hereinbefore set forth. The damage suffered by plaintiff was the natural proximate

consequences of defendant's acts of which plaintiff complains.

WHEREFORE, plaintiff demands judgment against defendant in the sum of twenty-five thousand dollars ($25,000) and costs.

WILLIAM J. BAUERS, JR.,
William J. Bauers, Jr., pro-se,
State Prison Number 38628,
Drawer N, Trenton, N. J.

[Notarization omitted.]

EXHIBIT "A".

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-510-63

STATE OF NEW JERSEY
plaintiff-respondent,

vs.

WILLIAM J. BAUERS, JR.,
defendant-appellant.

Considered May 5, 1964—Decided May 8, 1964.

Before Judges Goldmann, Kilkenny and Collester.

Mr. William J. Bauers, Jr., appellant, attorney *pro se*
Mr. William S. Stem, Hunterdon County Prosecutor, attorney for respondent.

The opinion of the court was delivered by

GOLDMANN, S. J. A. D.

Defendant appeals from the Hunterdon County Court's denial of his application to dismiss two indictments and vacate the illegal sentences imposed after he had pleaded guilty thereto.

I

On the evening of October 29, 1950 defendant and two other inmates escaped from the Annandale Reformatory

in Hunterdon County. Several days later he was apprehended and taken into custody by the police of Newark for offenses committed in Essex County while he was at large. The Essex County grand Jury on November 27, 1950 returned two indictments against him for these offenses, No. 653-50 charging assault with intent to rob, and No. 660-50 charging larceny of a motor vehicle. After initially pleading not guilty to both, he retracted his pleas and pleaded *non vult* when he appeared before the Essex County Court on January 2, 1951. Shortly thereafter the Essex County judge sentenced him to State Prison terms of 4-6 years on No. 653-50 and a like period on No. 660-50, the latter to run consecutively to the sentence imposed on No. 653-50. Defendant was received at the State Prison on January 15, 1951.

The Hunterdon County grand jury had meanwhile returned two indictments against defendant on January 3, 1951. Indictment No. 3733 charged him and the other two inmates with escape from Annandale (R. S. 2:126-6), and No. 3733A charged the three with larceny of a motor vehicle (R. S. 2:145-6). It was not until May 21, 1953 that Bauers appeared before the Hunterdon County Court. He requested that counsel be appointed on his behalf, and the then county judge did so. Immediately thereafter a jury was selected and the court recessed. When it reconvened, the assigned attorney represented to the trial judge that defendant desired to withdraw his previously entered plea of not guilty, and to plead guilty instead. That plea was accepted and the judge proceeded to sentence defendant to a State Prison term of 2-3 years on each of the indictments, the sentences to run concurrently with any existing sentences and, apparently, concurrently with each other.

(These facts, and those yet to be mentioned, were ascertained by the court's own investigation of the Hunterdon County Court records, including the Criminal Minutes; records in the Prosecutor's Office, and the Records of the Hunterdon County Juvenile and Domestic Relations Court.)

II

It appears necessary to set out defendant's subsequent criminal record in order to explain his present incarceration and the reason why he seeks to have the Hunterdon County indictments and sentences expunged from his record.

Bauers was paroled on June 6, 1955 on the sentences which the Essex County Court imposed in January 1951. In April 1956 he fled parole. He was again indicted in Essex County on November 13, 1956, the indictment charging him in separate counts with entering, larceny and receiving. At that time defendant was serving a five-year sentence in the federal penitentiary for a bank robbery, imposed by the United States District Court, Los Angeles, California, on August 5, 1956. Eventually, on July 25, 1960, he entered a plea of not guilty to the Essex County indictment just mentioned. On September 21 following he retracted that plea as to the entering and larceny counts and pleaded guilty. The county judge sentenced him on October 26, 1960 to a State Prison term of 3-5 years on the entering count, and suspended sentence on the larceny count. The third count (receiving) was dismissed soon after.

On the same day that defendant was thus being sentenced, the Hudson County grand jury returned three indictments, each charging him with armed robbery (first count) and assault with intent to rob (second count). He initially pleaded not guilty, but on February 14, 1961 retracted those pleas and pleaded *non vult* to all three indictments. On March 10, 1961 a Hudson County Court judge sentenced him on the first count of each indictment to 7-10 years in State Prison for robbery and 3-5 years for being armed, all the sentences to run concurrently with each other and with the Essex County sentence imposed on October 26, 1960. The second counts (assault with intent to rob) were dismissed. Defendant was received at the State Prison on March 23, 1961 to begin serving the Essex County sentence.

III

We return to a consideration of the Hunterdon County indictments and sentences. It appears that defendant originally applied to the Hunterdon County Clerk in late 1962 or early 1963 for copies of indictments Nos. 3733 and 3733A. On February 7, 1963 he filed a motion "to dismiss illegal indictments, illegal pleas and vacate illegal sentences." The county clerk forwarded the papers to the assignment judge. When defendant did not hear from the clerk or the assignment judge, he wrote both of them in March 1963. On April 17, 1963 the Hunterdon County Court judge, to whom the matter had been referred by the assignment, wrote defendant and informed him that "I am at a complete loss to understand what you hope to gain by making this application," because defendant had long since served the sentences imposed by the predecessor county judge; those sentences running concurrently with any existing sentences then being served. The judge stated that it was his intention not to appoint counsel unless it appeared that this would be of some benefit to defendant. This elicited two letters from defendant, dated April 22, 1963, one directed to the county judge and the other to the Chief Justice.

On May 15, 1963 the county judge wrote defendant informing him that his application was denied. Defendant at once filed a notice of appeal addressed to the letter of denial. Meanwhile, on May 27, 1963 the county judge entered an order denying defendant's "application for a writ of habeas corpus." Upon receiving this order, defendant wrote the county clerk requesting him to disregard the notice of appeal. Then, on June 7, 1963, he submitted to the clerk an application to set-aside the judgment of conviction and sentence entered May 21, 1953. The result was a letter from the Hunterdon County judge acknowledging receipt of the motion, stating that its contents were the same as in the "application for a writ of Habeas Corpus, which was

denied by me on May 27, 1963," and stating that since no new argument had been advanced, there was no necessity for a hearing and "This should conclude this entire matter." Defendant then wrote the judge on July 2, 1963 requesting that he file a formal order of denial. This was finally done on September 12, 1963.

Defendant is now serving the sentence imposed by the Essex County Court on October 26, 1960 and the Hudson County sentences imposed on March 10, 1961. He has been classified as a third offender for parole purposes, based on (1) the Essex County convictions in January 1951, (2) the federal conviction for robbery in California in August 1956, and (3) the Essex County and Hudson County convictions just mentioned. The record office at the State Prison considers that defendant completed the maximum on the May 21, 1953 Hunterdon County sentences in question as of April 6, 1955. Thus, when Bauers was paroled on June 6, 1955 on the Essex County sentences he was then serving, he had served his time on the Hunterdon County judgment of conviction.

Defendant is about to appear before the Parole Board and seeks to have the Hunterdon County indictments and convictions set aside as illegal, lest they prejudice his application for parole.

IV

The procedure invoked by defendant when he filed his motion with the Hunterdon County Court to dismiss the January 3, 1951 indictments as illegal, and to vacate the sentences imposed, was proper. As authority for his motion he cited *R. R.* 3:7-13, which at the time of his motion provided that the court may correct an illegal sentence at any time. (By amendment of December 9, 1963 all reference to correction of illegal sentences was deleted in view of the fact that this relief is now afforded under *R. R.* 3:10A.) Inasmuch as he was attempting to attack collaterally and have vacated an underlying conviction, he also cited and

relied upon *R. R.* 3:11-9. This procedural remedy was available to him. *Janiec v. McCorkle,* 52 *N. J. Super.* 1, 18 (App. Div. 1958). It is obvious from our recital that his motion was not considered by the county judge as submitted, but rather as an application for a writ of *Habeas Corpus*—a remedy neither appropriate nor available. *Ibid.,* page 12.

Defendant's motion, substantively, argued lack of jurisdiction in the sentencing court, i.e., the Hunterdon County Court. This was predicated upon the asserted facts that he was a juvenile at the time of the commission of the offenses, that exclusive jurisdiction was vested in the Juvenile and Domestic Relations Court (N. J. S. 2A:4-14, formerly R. S. 9:18-12), and that there had been no reference by that court to the prosecutor under the provisions of N. J. S. 2A:4-15 (formerly *R. S.* 9:18-12), so that the latter might deal with him in the same manner as he would an adult offender in a criminal case. Our investigation of the available records of the Hunterdon County Clerk, Prosecutor and Probation Office, corroborated by our check of the State Parole Board records, indicates that defendant is substantially correct in his appraisal of the substantive situation.

Defendant's birth record, a copy of which he submitted to the Hunterdon County Court, shows that he was born on November 26, 1932. That birth date has been verified. It follows that he was not yet 18 years of age when he escaped from Annandale and stole a car in Hunterdon County on the night of October 29, 1950. Inasmuch as the age at the time of the commission of the offense is ordinarily the determinative factor as to jurisdiction, *In re Smigelski,* 30 *N. J.* 513, 523 (1959), defendant was a juvenile offender and the Hunterdon County Juvenile and Domestic Relations Court initially had jurisdiction over him. *N. J. S.* 2A:4-14.

We find nothing which even suggests that there was any reference by the Juvenile and Domestic Relations Court to the prosecutor for the treatment of defendant as

an adult offender. See *N. J. S.* 2A:4-15. The files of the present Chief Probation Officer of Hunterdon County contain no reference to defendant. A review of the older records in the office of the Hunterdon County Prosecutor, in which transfers from the Juvenile and Domestic Relations Court to the prosecutor are recorded, contains no reference to defendant. In short, we find nothing to indicate that the Juvenile and Domestic Relations Court, which had the sole authority to do so, *State v. Van Buren*, 29 *N. J.* 548, 554 (1959), made any determination that criminal process should be invoked against defendant.

Accordingly, we conclude that indictments returned against defendant on January 3, 1951 were illegal and should have been set aside. It follows that his pleas of guilty should also have been set aside and the sentences imposed vacated.

V

Another aspect of the matter which draws the court's attention is the manner in which defendant was dealt with in the Hunterdon County Court on May 21, 1953. As the Criminal Minutes of that Court show, when defendant appeared in court he requested the appointment of counsel. His application was granted in open court. As already stated, the court then proceeded to have a jury selected. The Minutes show that all of this took place before 10:15 A. M., at which time the court recessed briefly. When the judge returned to the bench, assigned counsel represented that defendant would withdraw his previously entered plea of not guilty and would plead guilty. The court accepted the plea and the prosecutor moved immediately for sentence. The County judge then imposed the sentences already mentioned.

Certain things are, at least inferentially, obvious. Defendant could have had no adequate opportunity to consult with his assigned counsel. In these circumstances it is doubtful that counsel knew of defendant's age at the

time of the offenses charged, and that basis for challenging the County Court's jurisdiction existed. We note, in passing, that the Minute Book contained no entry indicating that defendant had ever previously pleaded not guilty. Neither the county clerk's nor the prosecutor's records make any reference to such a plea having been made. On the contrary, the backers on both indictments indicate that defendant was "Arraigned 5/21/53," the date on which he pleaded guilty and was sentenced. Finally, there is nothing in the record to indicate that the county judge then presiding had the benefit of a presentence report and investigation as required by then *Rule* 2:7-10 (d), now *R. R.* 3:7-10 (b), before sentencing defendant.

VI

Indictments Nos. 3733 and 3733A, returned January 3, 1951, should be expunged from the record, along with defendant's guilty pleas and the sentences imposed under the judgment of conviction. The matter is remanded to the Hunterdon County Court for the purpose of forthwith carrying out this directive.

Exhibit "B".

Law Offices
HERR AND FISHER
Flemington, N. J.

October 28, 1963

Hon. Sidney Goldman, S. J. A. D.
State House Annex
Trenton, New Jersey

Re: State v. Bauers
AM-314-62

Dear Judge Goldman:

By order dated October 3, 1963, I was assigned by your to represent the defendant, William J. Bauers, Jr. in his pending appeal before the Appellate Division. In accordance with your honor's assignment I immediately began investigating and reviewing this defendant's past criminal record.

In reviewing the County Court Criminal Minutes as they pertain to his sentencing here in Hunterdon County, I found the following:

(a) On May 21, 1953, the defendant, who for many months before had demanded a speedy trial, was taken from the State Prison and delivered before Judge Schenk for trial at 10 a.m.

(b) Defendant requested and was assigned counsel Lloyd Fisher, Esq. of this firm, was assigned on the spot.

(c) Twelve jurors were picked.

(d) The next entry on the Minutes at 10:15 a.m. is as follows:

> "At this point C. Lloyd Fisher, Attorney for defendant stated that the defendant, William J. Bauers, Jr. decided to withdraw a previously entered plea of not guilty and enter a plea of guilty. A plea of guilty was entered by the Court. Prosecutor moved for sentencing, and the prisoner was then and there sentenced and returnd to State Prison.

Nowhere in my examination of the Minutes can I find that Bauers ever entered a plea of not guilty. Nowhere in my investigation of the Minutes or the Prosecutor's Office records can I find where a probation report was ever filed. It appears probable that a successful result on appeal would necessarily have to touch upon the handling of the case before the trial court here in Hunterdon County. Mr. Fisher, as your honor well knows, was a member of this law firm for many, many years. Under the factual circumstances, I personally feel that it might be well for your honor to seriously consider assigning another attorney to represent the defendant.

If your honor concurs in my view, I should be very happy to take on the responsibility of the next criminal assignment in Hunterdon County.

Please advise.

Sincerely yours,

HERR AND FISHER
s/ COWLES W. HERR

CWH:amg
cc: Hon. Philip R. Gebhardt
Mr. William J. Bauers, Jr.

Exhibit "C".

HUNTERDON COUNTY COURT
LAW DIVISION

STATE OF NEW JERSEY

v.

WILLIAM J. BAUERS, JR.,

Defendant.

ORDER

IT APPEARING that the Appellate Division of the Supeior Court of New Jersey in an Opinion, dated May 8, 1964, has directed that Indictments Nos. 3733 and 3733A, returned January 23, 1951, against the above named Defendant be dismissed, and the record under the said Indictments be expunged.

THEREFORE it is on this 15th day of June, 1964. ORDERED that the said indictments Nos. 3733 and 3733A, returned January 23, 1951, against the above named Defendant be, and the same are hereby dismissed, and the record under the said indictments be expunged.

June 15, 1964

s/ PHILIP R. GEBHARDT, *Judge*

ORDER OF JANUARY 26, 1965, OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

It appearing to the court that the complaint of the plaintiff, William J. Bauers, Jr., wherein he complains of acts of defendant while acting in the capacity of Prosecutor of Hunterdon County and under the authority of his office as Prosecutor, is lacking in merit and pertains to matters over which the court has no jurisdiction;

It is, on this 26th day of January, 1965, ORDERED that the complaint in the above-entitled matter be and the same is hereby dismissed.

It is further ORDERED that the Clerk of Court file the complaint, together with this order, without costs.

ARTHUR S. LANE,
Arthur S. Lane,
Judge, United States District Court.